UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF VIRGINIA, AT ROANOKE.

BLEVINS, ADM'R *v.* HINES, DIRECTOR GENERAL OF RAILROADS.

Werth & Werth, p. q.

Smith & Funkhouser and *Staples, Cocke & Hazlegrove,* p. d.

McDOWELL, District Judge:

(Excerpt from Opinion)

PROOF OF NEGLIGENCE.

The degree of proof necessary to maintain any issue in a litigated case is, I think, a matter of procedural law. While not strictly a rule of evidence, it is a rule relating to evidence, and seems as much a part of the law of procedure as are the rules as to the competency of witnesses and as to the admissibility of testimony. It follows that any well-settled rule of the Virginia Court of Appeals on this point should be followed by this court, unless so doing would "unwisely encumber the administration of justice." Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 300, 301; Chappell *v.* U. S., 160 U. S. 499: 514.

The following in part places in due sequence the respective contentions of counsel in this case:

"(1) Negligence may be proved by a preponderance of evidence; (2) but a probability of negligence is not sufficient. (3) The party who affirms negligence must establish it by proof sufficient to satisfy reasonable and well-balanced minds; (4) but he is not required to prove negligence beyond a reasonable doubt."

(1) The first proposition is laid down in many Virginia decisions. See for instance, Honaker *v.* Whitly, 124 Va. 194, 206; Norfolk & W. R. Co. *v.* Sink, 118 Va. 439, 450; Steele *v.* Colonial C. & C. Co., 115 Va. 385, 388; Chesapeake & O. R. Co. *v.* Heath, 103 Va. 64, 67; Norfolk & W. R. Co. *v.* Poole, 100 Va. 148, 154. (2) The second is also a statement frequently made. See Norfolk & W. R. Co. *v.* Cromer, 99 Va. 763, 794; Wells *v.* Sutherland C. & C. Co., 116 Va. 1003, 1007; Chesapeake & O. R. Co. *v.* Heath, 103 Va. 64, 66; Lynchburg Tel. Co. *v.* Booker, 103 Va. 594, 601, 609; Norfolk & W. R. Co. *v.* Johnson, 103 Va. 787, 789; Southern R. Co. *v.* Hall, 102 Va. 135, 138; Consumers' Brewing Co. *v.* Doyle, 102 Va. 399, 402; Chesapeake & O. R. Co. *v.* Sparrow, 98 Va. 630, 640-1. (3) The third is taken from Chesapeake & O. R. Co. *v.* Heath,

104 Va. 64, 66; reaffirmed in Wells *v.* Sutherland C. & C. Co., 116 Va. 1003, 1006; and in Consumers' Brewing Co. *v.* Doyle, 102 Va. 399, 402. (4) The fourth is from Wood *v.* Southern R. Co., 104 Va. 650, 655.

The phrase, preponderance of evidence, from its derivation means primarily evidence which outweighs; and hence, evidence which is better entitled to credence. Such is the sense in which juries will naturally understand the phrase, and such is the sense in which it is nearly always used in instructions. Black's Law Dict. 932; 2 Bouv. Law Dict., p. 730; 6 Words & Phrases (1st ed.) 5516 et seq.; 3 ibid (2d ed.) 1149 et seq. But where the evidence in favor of the charge only slightly outweighs that having the opposite tendency, there is necessarily left room for some doubt. A sufficient preponderance therefrom seems very accurately expressed as follows: "that superior weight of evidence which, while not enough to wholly free the mind from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than the other," Or by:—"That degree of evidence which induces belief, but not certainty;" or "That state of case * * * which results from superior evidence * * * on one side, inclining the mind to receive that as truth, but leaving some room for doubt." The first of these quotations is the definition of preponderance of evidence taken from the Georgia Civil Code, sec. 5145 (Jones *v.* McElroy, 134 Ga. 857, 68 S. E. 729, 137 Am. St. 276, 279). The last two are taken respectively from Worcester's Dictionary and the Century Dictionary, and are meanings of the word probability. If the word probability be understood in the foregoing sense, as it very frequently would be, an instruction that a preponderance of evidence of negligence is sufficient, but that a probability of negligence is not sufficient, is clearly contradictory and utterly confusing.

Again, in Chesapeake & O. R. Co. *v.* Heath, 103 Va. 64, 66, it was said: "The party who affirms negligence must establish it by proof sufficient to satisfy reasonable and well-balanced minds." In the later case of Wood *v.* Southern R. Co., 104 Va. 650, 655, it was said: "A plaintiff in an action to recover damages for personal injury is no more required to prove his case beyond a reasonable doubt than in any other civil action."

If there is any sound distinction between "evidence sufficient to satisfy" and "proof beyond a reasonable doubt," it is too fine and too evanescent for use in instructing juries.

It should here be said that Norfolk & W. R. Co. *v.* Cromer, supra, can not be regarded as a reversal based merely on the fact that the trial court refused to instruct that a probability

of negligence is not sufficient. The instructions given by the trial court in that case entirely ignored the danger that the jury might find for the plaintiff on the strength of a mere surmise or conjecture of negligence. And if the instructions given had warned the jury that a surmise or conjecture of negligence was insufficient, it seems to me highly probable that the Court of Appeals would not have held the trial court's instruction objectionable.

I cannot believe that it is the settled rule in Virginia that the foregoing contradictions must be asserted in instructions in negligence cases. But if so, an all sufficient reason exists why the federal trial courts in this state should not follow such rulings: It most unwisely encumbers the administration of justice to give contradictory and confusing instructions.

The confusion found in the Virginia negligence cases (which also prevails elsewhere—29 Cyc. 621-623) is probably due to a fear that juries may not distinguish between a surmise of negligence and a very slight preponderance of evidence sustaining the charge. This danger has led in other states to the use of such expressions as, "a clear preponderance," or "a fair preponderance," 17 Cyc. note p. 764; 21 Am. & Eng. Ency. (2d ed.) 516. Both expressions seem to me open to some objection because of their uncertainty of meaning. How much preponderance is a clear preponderance? What preponderance is a fair preponderance? To use these expressions seems to me, with deference, to involve juries in subtleties and doubts which should be avoided. In French *v.* Day, 89 Me. 441, 36 Atl. 909 (6 Words & Phrases 5517) it was said: "Preponderance of evidence means to outweigh; to weigh more. A clear preponderance may mean that which may be seen, understood; but it may also convey the idea of certainty, beyond doubt. Therefore an instruction in an action of trespass, where the defendant justified the trespass, that it was incumbent on the defendant to show by clear preponderance of evidence his right to the same, was erroneous."

If a preponderance of evidence of negligence is sufficient—and it has been too often said that it is by the Virginia Court of Appeals to be doubted—it follows that any preponderance, even the slightest preponderance, must be sufficient. But the danger of confusing a conjecture and a very slight preponderance of evidence certainly exists. And it seems to me that an accurate method of avoiding this danger is to instruct that while a preponderance, even a very slight preponderance, is sufficient, yet the jury *must be certain that*

there is a preponderance of evidence in support of the charge. As of course, negligence does not have to be proved to a certainty; but since some preponderance is absolutely necessary, and as the difference between a very slight preponderance and an equilibrium of evidence may not be readily recognized by some jurors, it seems but just that the jury be told that they must be certain that there is a preponderance before deciding that there was negligence.

An instruction which seems to avoid the contradictions of the instruction set out above, and which at the same time gives to each party all that he is entitled, may be expressed as follows:

Negligence is the failure to use ordinary care to perform a duty. The burden of proving the charge of negligence on the part of the defendant rests on the plaintiff. The burden of proving the charge of contributory negligence on the part of plaintiff's decedent rests on the defendant.

The party bearing the burden of proof of negligence must fail unless there is a preponderance of the evidence supporting the charge of negligence. The expression "preponderance of the evidence," means evidence which outweighs, which is better entitled to belief, than the opposing evidence. The number of witnesses testifying for the respective parties does not necessarily determine the question. A mere conjecture or surmise of negligence is not sufficient, and the mere fact of the injury does not of itself justify an inference of negligence. But negligence does not have to be proved beyond all reasonable doubt. Any preponderance of evidence, however slight, is sufficient; if you are certain that there is a preponderance of evidence supporting the charge.